

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF NEW YORK
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 6 YVETTE RUBERY, et al.,) 04-CV-6337(L)
 7 Plaintiffs)
 8 vs.)
 9) Rochester, New York
 10 BUTH-NA-BODHAIGE, INC.,) May 20, 2008
 11 Defendant.) 11:15 a.m.
 12 - - - - - X

13 TRANSCRIPT OF PROCEEDINGS
 14 BEFORE THE HONORABLE DAVID G. LARIMER
 15 UNITED STATES DISTRICT JUDGE
 16

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P R O C E E D I N G S

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4 THE COURT: All right, good morning. Sorry for the
slight delay, but --

11:19AM

5

MR. SOLOMON: Good morning, Your Honor.

6

THE COURT: Good morning.

7

MR. SCANLON: Good morning, Your Honor.

8

9 THE COURT: Good morning. Do we have appearances for the
record? We have already, okay.

11:19AM

10

THE REPORTER: Yes.

11

12 THE COURT: Well, this case is back. I've dealt with it
on a few occasions, and I guess we're dealing with the application
13 to certify this as a collective action.

14

11:19AM

15

16 Whenever I deal with these issues -- and I have faced
them on not a few occasions before -- the applicant, the
17 plaintiff, always points out to me that the standard is pretty
lenient at this stage because one could say it's just giving
18 notice to people and they may or they may not choose to opt-in or
19 not.

11:20AM

20

21 And I know part of the argument here is that plaintiff
really has failed to establish that these folks are similarly
22 situated.

23

24 Maybe you could both comment on that as to whether, I
guess at this stage, I should worry too much about that.

11:20AM

25

In other words, whether this is something that could be

1 sorted out later on depending on whether we have 10 people opt-in
2 or 10 times 10 people.

3 So whoever wants a crack at it first.

4 MR. SCANLON: Your Honor -- go ahead.

11:20AM 5 MR. SOLOMON: Thank you, Your Honor. The issue that you
6 raise as to whether now is the time to delve into the merits and
7 the scope and the exact identity of who receive notice has been
8 addressed by this Court in the *Parks vs. Dick's Sporting Goods*
9 matter in a decision from Judge Siragusa --

11:21AM 10 THE COURT: Right.

11 MR. SOLOMON -- which was affirming a decision from
12 Magistrate Judge Feldman.

13 In there the Court said, you know, as to these issues, I
14 understand that defendant is raising certain defenses and the
11:21AM 15 question and the timeliness of that issue is do you reach it at
16 the initial stage of certification or do you reach it at a later
17 time post discovery in response to a decertification motion from
18 the defendant.

19 And there the Court said, "I agree with Judge Feldman
11:21AM 20 that that is the appropriate time to deal with those specific
21 issues."

22 THE COURT: And I think you have suggested that it's not
23 just that case from Brother Siragusa, there's other authority that
24 speaks to that as well. Not that Judge Siragusa's decision isn't
11:21AM 25 usually enough for me, but --

1 MR. SOLOMON: That's right, Your Honor. In our papers we
2 do submit a number of cases suggesting that the defendant is
3 basically raising merits, credibility, and temporal scope defenses
4 and that those issues are better left for post discovery.

11:22AM

5 I can go through the different cases --

6 THE COURT: No, I think we're not unfamiliar with them,
7 and I think they're in your papers, but how many opt-ins or
8 individuals have indicated their interest now?

11:22AM

9 I think at some point I made a note that some 60
10 managers had filed affidavits and that there were several dozen
11 that actually opted-in.

12 MR. SOLOMON: That's correct, there's approximately 60
13 shop managers who have opted-in, and we did submit eight
14 affirmations, including Ms. Rubery's.

11:22AM

15 THE COURT: What's your guesstimate as to how many more
16 there might be? 60 sounds like a pretty good number, I mean.

17 MR. SOLOMON: Well, there's approximately 300 nationwide,
18 and turnover in the retail industry, you know, can range any
19 number. So depending on how many shop managers worked at each of
20 those shops, there could be anywhere from 300 to 700 shop
21 managers. And, of course, it would depend -- I haven't seen
22 anything from the defendant yet on the list of employees, but it
23 would be in that number is my guess.

11:23AM

24 THE COURT: Any thoughts or response to --

11:23AM

25 MR. SCANLON: Good morning, Your Honor. Let's start with

1 the number of opt-ins. As Your Honor remembers, because you wrote
2 a decision about this, there actually were 58 opt-ins; two of them
3 did not work in the relevant time period. So I believe we have
4 the names of 56 relevant opt-ins, but that list came from a notice
11:24AM 5 that was sent out by plaintiff's counsel. Your Honor wrote a
6 decision on that.

7 So there's reason to believe that these were the best
8 they could find out of the 300 shop managers nationwide because
9 they had a list of the entire workforce during this relevant time
11:24AM 10 period that they used to contact former shop managers, and out of
11 that they got roughly 60.

12 Now, what's different about --

13 THE COURT: I guess I would say well, so what? In the
14 sense how does that affect my decision as to whether or not to let
11:24AM 15 them send out now a Court-approved notice?

16 MR. SCANLON: What I wanted to point out about the number
17 of opt-ins, Your Honor, that is an example that everywhere you
18 look in this case at the facts, we do know -- and this case has
19 been going on for some time, so there have been facts that have
11:24AM 20 been developed.

21 You see that from 50% to 80% of the putative class
22 members will not qualify for overtime under your decision, that is
23 to say on the decisive issue of whether they supervised two or
24 more full-time employees.

11:25AM 25 We have submitted evidence to the Court and I'd like to

1 go over that with Your Honor this morning because it's very easy
2 to see when you see it on paper, but take those 58 opt-ins, for
3 example, or 56, nearly half of them or more than half, depending
4 on whether you count their paid leave time or not, supervised more
5 than 80 hours per week more than 80% of the time.

6 Thus, under your decision as a matter of law, they would
7 not qualify for overtime under that prong of the FLSA.

8 And this is something that's unique, Your Honor.

9 Mr. Solomon mentioned the *Parks* case. The *Parks* case was driven
10 by the facts, as all of these cases are, because I can point to
11 your own decision in which Your Honor said that these cases don't
12 lend themselves to class actions to facts involving each shop
13 manager and what their respective job duties was.

14 In this case on summary judgment you mentioned, even as
15 to Rubery herself, there were many facts in dispute that would
16 have to be decided by the fact finder and that would only be
17 multiplied if you had 50 people in a class or whether you had 100
18 people in a class.

19 But going back to *Parks*, in that case, Your Honor, the
20 judge found that the golf professional supervised nobody,
21 certainly not the case with shop managers; the job description had
22 no managerial or supervisory duties in it is whatsoever; the
23 training program had no managerial training; and that there had
24 been -- they had treated all of the golf professionals exactly the
25 same in the whole -- in the whole company, which is not true here.

1 There were shop managers in The Body Shop who were
2 exempt in some and some were non-exempt. Even the action that the
3 plaintiffs cite in this case where Ms. Rubery was changed to
4 non-exempt only affected 30 or 40 people.

11:27AM

5 They looked at their shops individually, and the reason
6 they did that was because she was in one of the smaller volume
7 shops here in this area and they needed to cut back on the
8 full-time employment because they weren't making their budget.

11:27AM

9 They had enough volume in the larger stores, but they
10 didn't in the smaller stores. They look at those individually.
11 When they cut back on the budget for subordinate employees, they
12 decided they could no longer justify the overtime exemptions for
13 those 30 or 40 stores and this is set forth in the complaint in
14 this case.

11:27AM

15 And if you look at -- we've been before Judge Feldman
16 recently, Your Honor, and he has told us to engage in discovery in
17 the New York State class which involves managers in New York
18 State. And the same expert we're using in this case has looked at
19 those shop managers who were in New York and nearly 80% of those
20 would not qualify under your standard.

11:28AM

21 The third source of this information, Your Honor -- and
22 I would like to pass these up so you can look at them, you can
23 look at them very quickly, they're simple -- the third source of
24 information is that five stores sample study we did at
25 Judge Feldman's suggestion in 2005, I believe it was, several

11:28AM

1 years ago, and we were having a difference of opinion on
2 discovery.

3 He suggested, he said, Mr. Scanlon, why don't you do a
4 sample study? Because he recognized the cost involved in looking
11:28AM 5 at all the stores, so we randomly selected five stores and looked
6 at the shop weeks. At that point there were no opt-ins.

7 We were looking at stores rather than individuals and it
8 turned out, Your Honor, there were 680 shop weeks for that five
9 stores, roughly 135 per store of weeks, and 89% of those there was
11:28AM 10 more than 80 hours of subordinate time each week. So we have 89%,
11 we have 79%, and we have the opt-ins around 50% of the time.

12 So the question I would put before Your Honor is there
13 has never been a case in which a court has granted this collective
14 action certification where the judge knew in advance that between
11:29AM 15 half of the members of the class and perhaps as high as 80% of the
16 class will not qualify under the Court standards for overtime;
17 that's why they're not similarly situated.

18 THE COURT: I mean, I guess part of that argument hinges
19 on, to some extent, whether the plaintiffs agreed with your
11:29AM 20 assessment and what you said sounded like sort of the merits
21 argument that maybe should be deferred.

22 But as you were talking, I also thought of this: If the
23 Court does not certify this, how is it really going to change the
24 lawsuit? You've already got a number of people involved. I mean,
11:30AM 25 isn't it going to make the lawsuit easier to litigate? More

1 difficult?

2 MR. SCANLON: It will make it more difficult, Your Honor,
3 and it's not that.

4 THE COURT: What if I certify or if I don't?

11:30AM 5 MR. SCANLON: Yes. If you do certify, it will make it
6 more difficult and more expensive needlessly.

7 And here's why I say needlessly: Because of the 60 that
8 we have in the case now, as I said, half of them will probably
9 fall out when you come back after the full discovery -- and this
10 is not disputed in terms of the facts and what these are from.

11 MR. SOLOMON: This is disputed, Your Honor.

12 MR. SCANLON: There's no dispute as to this. It's been
13 in the record for a long time.

14 MR. SOLOMON: If I can point out this point?

11:30AM 15 THE COURT: One at a time here. Mr. Scanlon has the
16 floor.

17 MR. SCANLON: And if -- if Your Honor was to allow
18 further notices to the entire class, the evidence suggests that
19 more than two-thirds of those recipients of the notice inviting
20 them to join this case will not qualify.

21 So why should they be given an invitation to join the
22 case if we have solid evidence to suggest that they won't qualify?

23 In the *Rite Aid* case, Your Honor, which I think is in
24 our brief, says that a defendant is permitted to come forward on
11:31AM 25 this class action stage and offer evidence to show that they're

1 not similarly situated.

2 So it's not inappropriate for The Body Shop to say, Your
3 Honor, they're not similarly situated for one very simple reason:
4 They're not going to qualify under your standard.

11:31AM 5 THE COURT: Well, aren't there two things? Number one,
6 there's a whole body of law where courts consider decertification
7 applications which suggest that certification was allowed
8 initially, and then things developed; and if they develop as you
9 suggest, then maybe that's the time to deal with this.

11:31AM 10 The second point is are there any set of facts that the
11 Court might modify or alter the description of the class here? I
12 mean, nobody suggested that and maybe that's not something that's
13 in the cards, but --

14 MR. SCANLON: Your Honor, we did suggest that in our
11:32AM 15 brief. It was not our first position, but we did suggest --

16 THE COURT: I only read the first position. A little
17 light humor here.

18 MR. SCANLON: Your Honor, as many briefs as have been
19 filed in this case, one could be forgiven for not remembering
11:32AM 20 every argument that both sides have been made.

21 THE COURT: I've been kind of jammed with a trial, but go
22 ahead.

23 MR. SCANLON: I understand, Your Honor.

24 Your Honor, one of the things that we -- an argument
11:32AM 25 that we made -- and I do want to go back to this chart, but

1 without prejudice to that argument, I would say that a fallback
2 position that The Body Shop offered in this case was as follows:
3 And that was to only send the notice out to those individuals who
4 would have a chance of qualifying for overtime, and here's what I
11:33AM 5 mean by that: In your opinion, you said if you have over 80
6 hours more than 80 percent of the time, as a matter of law you
7 don't qualify. You said under 80%, you said it's up to the fact
8 finder, it has to go to trial.

9 So if we sent notices out to those shop managers who
11:33AM 10 supervised according to the records, the only records we have in
11 the case maintained in a computer base by the company, that
12 supervised less than 80 hours who would have a chance, go through
13 discovery with them, and then come back and see how many of them
14 would qualify, how many would not, that would at least avoid
11:33AM 15 the -- it would avoid sending notices out to a lot of people, Your
16 Honor, who I don't believe would ever qualify.

17 Now, the reason I said that's our secondary position is
18 because they have only listed one class definition in this case
19 from the beginning of this lawsuit. They have said people who
11:34AM 20 have supervised less than two full-time employees, you have to
21 have that characteristic to be in this class. They have never
22 waived from that definition.

23 My understanding of the case law, Your Honor, and you
24 certainly considered a lot of class actions in your years of
11:34AM 25 experience, but typically the Court and the defendant do not

1 rewrite the plaintiff's class definition. If the class definition
2 doesn't meet the legal standard, it's denied.

3 But having said that, I did want to point out that we do
4 offer this secondary possibility of only sending out notices to
11:34AM 5 those people who did, according to the record, supervise less than
6 80 hours and, therefore, the fact the jury would have to define --
7 decide in that case, the fact finder, whether or not that was two
8 full-time employees.

9 Your Honor, if I could just hand up -- and Mr. Solomon
11:34AM 10 has a copy of this, Your Honor.

11 THE COURT: Let me just -- this is brand-new. I don't
12 know how the plaintiff feels about receipt of this at this stage.

13 MR. SCANLON: Your Honor --

14 MR. SOLOMON: This is an amended -- excuse me. This was
11:35AM 15 an amended affidavit that was handed to me just prior to your
16 sitting on the bench. I've read earlier versions of it, but I
17 haven't read this, which has some amendments.

18 MR. SCANLON: Your Honor, the first part of this, the
19 first two charts in this affidavit are identical to charts that
11:35AM 20 have been in the case -- for some time in this case.

21 The only change is that there were five opt-ins, Your
22 Honor, out of the 60 who we do not have the correct name because
23 they had either gotten married or divorced since the names we were
24 provided by Mr. Solomon, we were able to get those names and we
11:35AM 25 went back and added those statistics.

1 MR. SOLOMON: Before -- I'm sorry, Mr. Scanlon.

2 Before Mr. Scanlon gets into this, can I just raise one
3 point for the Court to consider? Which is basically this is the
4 exact type of information that the defendant relied on in moving
11:36AM 5 for summary judgment and the Court said the information relied on
6 by Dr. Siskin is subject to a motion to compel before
7 Judge Feldman, and held that that, in any event, would raise
8 questions of fact going to the merits of plaintiff's claims.

9 The judge granted -- Judge Feldman granted our motion to
11:36AM 10 compel, and since then we have not received the information
11 ordered by Judge Feldman as to the underlying data relied on by
12 Dr. Siskin.

13 So we would state that this information now is not
14 relevant, number one, because it's merit based.

11:36AM 15 Number two, because we have never received the
16 underlying data we requested and that was ordered by
17 Judge Feldman.

18 And, number three, that the amended document not be
19 considered because it was only handed to us at the beginning of
11:37AM 20 the argument.

21 THE COURT: Is there any schedule or deadline for
22 complying with Judge Feldman's directive relative to underlying --

23 MR. SCANLON: Your Honor, there was no set deadline, but
24 three weeks ago -- and I have the letter right here -- I wrote to
11:37AM 25 Mr. Solomon and I said, "We have the information, here's a

1 proposed confidentiality agreement to protect the confidential
2 information, please get back to me on that." And there was one
3 aspect of the data that Judge Feldman had said -- asked us to give
4 an estimate of the cost and provide that to Mr. Solomon.

11:37AM

5 He has not responded to the letter three weeks ago; he
6 has not given me any feedback on the confidentiality order, and so
7 I have not provided the documents because it was clear that this
8 includes confidential information, but -- individual personnel,
9 their records and so forth, and he simply ignored the letter.

11:37AM

10 So, I mean, I've got the letter right here dated
11 May 1st, Your Honor, to Mr. Solomon.

12 MR. SOLOMON: That's exactly just a side issue.

13 The main issue is there was a confidentiality agreement
14 that was exchanged at the beginning of the case that would have
15 addressed this, number one.

11:38AM

16 Number two, the order says that any expert analysis or
17 documents they intend to rely on in its opposition to the
18 collective action must be disclosed.

19 It's not helpful for us to get it after the oral
20 argument or after any decision from the Court, regardless of the
21 date. As to the date, Mr. Scanlon said he could turn it over in
22 30 days from the oral argument.

11:38AM

23 THE COURT: Well, I guess the Court has a couple of
24 options. One, I could just not accept this affidavit, or I
25 could -- amended affidavit or declaration; or I can give you,

11:38AM

1 Mr. Solomon, if you can work out the logistics of getting the
2 material directed to be produced by Judge Feldman, for you to
3 respond to this if you are so inclined.

4 MR. SOLOMON: I think our first argument is that,
11:39AM 5 Judge Larimer, that it's not relevant at any time and that's --
6 Mr. Scanlon had --

7 THE COURT: Because it's merit based?

8 MR. SOLOMON: Number one, it's merit based.

9 Number two, it would go to Mr. Scanlon's request that
11:39AM 10 there be discovery had prior to the Court's ruling on this motion.

11 And that you already had issued an order that the motion
12 to compel be heard regardless, and that the motion for notice
13 proceed independently of that. And that is based in the law
14 that --

11:39AM 15 THE COURT: So your request is what relative to this?

16 MR. SOLOMON: That, number one, that that recent amended
17 document not be addressed by the Court.

18 But even more important than that is that any merit
19 based argument based on the analysis that the people who have
11:39AM 20 opted-in is not relevant as to whether notice should go forward.

21 As you pointed out at the beginning, that the mere fact
22 that the plaintiffs engaged in their protected right to advertise
23 and solicit opt-in plaintiffs has no impact on whether the Court
24 should issue notice.

11:40AM 25 In fact, there's a decision of the Southern District

1 called *Lynch vs. United Services Automobile Association*. The cite
2 is 491 F. Supp.2d 357, and the decision --

3 THE COURT: Is that in your papers?

4 MR. SOLOMON: No, this is a decision that wasn't cited at
5 the time because I don't think the argument was raised.

6 But this is dated -- this predates our filing; it's
7 April 26th, 2007. And there's a short quote: Finally, informal
8 efforts by plaintiffs and their counsel to provide notice to
9 potential opt-ins through advertisement letters or other means are
10 not factors to be considered by courts when determining whether to
11 approve court-authorized notice.

12 And so our, you know, the further extension of that
13 argument is defendant's argument here that these opt-ins, you
14 don't need to be thoroughly analyzed and have summary judgment
15 decided as to those people. In other words, whether they have
16 claims here or not. That's not appropriate at this time.

17 THE COURT: Mr. Scanlon suggested that as an alternative
18 remedy, there might be some modification of the description here.
19 What's your take on that?

20 MR. SOLOMON: That is a misstatement of our filings in
21 this case, the complaint, and also a misstatement of their defense
22 in the case so far.

23 They have asserted that there's an exemption. We said
24 that Ms. Rubery was misclassified. In order for them to meet that
25 burden, they need to show that her primary duty was of an

1 executive nature and that she supervised two or more employees.

2 Looking first at our complaint, we define the class.

3 And it's interesting because they cite the exact language we use,

4 and I guess there's a difference as to what it means, but our

11:41AM 5 language is the class is defined as employees who were served or

6 permitted to work more than 40 hours in a week by defendant -- the

7 important part -- whose job duties included performing sales

8 functions.

9 That's the primary duty aspect. Our position has been

11:42AM 10 that she doesn't meet the primary duty test, number one.

11 Number two, while supervising fewer than two or more

12 employees.

13 At summary judgment the Court considered and found that

14 there were material questions of fact as to both prongs of the

11:42AM 15 employer's defense.

16 Likewise, our motion for notice views the exact same

17 language. We asked for notice to all current and former employees

18 of defendant whose job duties included performing sales functions

19 while supervising fewer than two full-time equivalent employees.

11:42AM 20 THE COURT: Well, there's no doubt that if I approve a

21 notice, I certainly can direct that the notice and the language I

22 think appropriate should be utilized?

23 MR. SOLOMON: That's correct, Your Honor. And our

24 request had been that the -- that that notice goes out to people

11:43AM 25 who are similarly situated to Ms. Rubery.

1 And at the time that we're alleging that The Body Shop
2 violated the FLSA with respect to Ms. Rubery was prior to the time
3 that she was reclassified. That is, when she was working as a
4 shop manager and was being paid on a salary exempt basis by the
11:43AM 5 defendant.

6 THE COURT: You mean when everybody was reclassified
7 or --

8 MR. SOLOMON: There was in July of 2003 a number -- I
9 don't have access to that yet -- of shop managers that were
11:43AM 10 reclassified from exempt to non-exempt. Ms. Rubery was one of
11 those employees.

12 THE COURT: All right. It wasn't an across-the-board
13 thing?

14 MR. SOLOMON: That's correct. But the affidavits that we
11:43AM 15 submitted, affirmations in support for our motion for notice are
16 from half people who were not reclassified and who remained as
17 shop managers on a exempt basis; as well as an additional half
18 people who were reclassified. Their job duties remained the same
19 prior and after the reclassification.

11:44AM 20 They both allege in their affirmations they supervised
21 fewer than 40 employees, and that their primary duties were not
22 management, but were the same duties as all the other hourly shop
23 employees.

24 MR. SCANLON: Your Honor, may I respond to some of this?

11:44AM 25 THE COURT: Well, let me -- I'm going to suggest, since

1 this case has been well-briefed and I'm not unfamiliar with the
2 entire case, and in the interest of the shortness of life, I'm
3 going to ask you to conclude. And, I guess, Mr. Scanlon, I'll let
4 you go first and just see if you can hit --

11:44AM 5 MR. SCANLON: I'd like to --

6 THE COURT: -- a couple minutes here, and then I'll give
7 Mr. Solomon a chance to respond and we'll --

8 MR. SCANLON: Your Honor, what I just handed you in the
9 prior affidavit by this expert, which the current one amends it,
10 was from 2007. Certainly can't be any complaint about that in
11 terms of timeliness.

12 And if Your Honor would look at that, the chart on that,
13 what it shows are all of the people and the percentage of time
14 that they supervised more than 80 hours per week of the opt-ins.

11:45AM 15 THE COURT: Okay.

16 MR. SCANLON: If you look at chart number 1, for example,
17 it shows 20 individuals of the opt-ins and it shows the percentage
18 of time that they supervised more than 80 hours per week.

19 The first five or six or -- 100% of the time, going down
11:45AM 20 to 80% under your decision, all those opt-ins would fail to
21 qualify for overtime.

22 If you look at chart 2 --

23 THE COURT: But just -- I mean, not to -- I just get the
24 sense that Mr. Solomon may not concur in all of this. In other
11:46AM 25 words, there may be some dispute as to whether Ms. Hale or

1 Ms. Mahan or Ms. Cruz did and worked the kind of hours and under
2 the circumstances you suggest here.

3 MR. SCANLON: Your Honor, virtually everything in this
4 case has been disputed by the plaintiff that the company has
11:46AM 5 offered. That doesn't mean it's not compelling evidence.

6 Mr. Solomon has disputed that he got notice of this
7 information, and I also handed you a letter dated May 1st, Your
8 Honor, that he has not responded to.

9 I do not appreciate opposing counsel saying it's unfair
11:46AM 10 that he doesn't have certain information when he's had a letter
11 with an offer to provide the information for three weeks and
12 hasn't even found it within himself to reply.

13 THE COURT: I understand your point. All right, let's
14 conclude your presentation, Mr. Scanlon, and then we'll give
11:47AM 15 Mr. Solomon the last word since he's the applicant here.

16 MR. SCANLON: Your Honor, what the plaintiffs are
17 attempting to do in this case is to send out a notice to the
18 entire country of shop managers.

19 We have pointed out problems specifically with the
11:47AM 20 notice itself. What we've been dealing with today are whether any
21 notice should go out at this point. That notice would go to
22 hundreds of former shop managers at their last known address that
23 worked for The Body Shop.

24 And because of information that has been developed in
11:47AM 25 the course of the summary judgment motion and the other

1 dispositive motions in this case, we have a factual record here.
2 Unlike most cases that Your Honor has considered and other judges
3 have considered, when the issue of certification has arisen, this
4 isn't in the first six months or the first 12 months of the case;
11:47AM 5 this is -- this case has been going on for five years, or four and
6 a half years.

7 And we have a record in this case, Your Honor, and what
8 the record shows -- and this has been very difficult for The Body
9 Shop to produce this very expensive -- we dealt with Judge Feldman
11:48AM 10 about this. We've offered to produce this to the plaintiff as
11 soon as he agrees to an appropriate confidentiality order.

12 What that record shows, if those notices go out to shop
13 managers throughout the country, it is going to be a notice that
14 is far too broad because from 50% to 75% of those shop managers we
11:48AM 15 know from their official records in The Body Shop supervised two
16 or more people 90 or 100% of the time. That is what this chart
17 shows, and that's what the other evidence shows.

18 So this is a company in which certain shop members, Your
19 Honor, may not have supervised as many as 80 hours per week and
11:48AM 20 that will go to the jury to determine whether or not that was --
21 that qualifies under the statute.

22 But we know that many, if not most of the shop members
23 in this company, supervise well towards 100% of the time, they had
24 more than 80 hours per week. And, therefore, we are going to be
11:49AM 25 spending money and sending out notices to a lot of people who

1 don't qualify.

2 And what Mr. Solomon's record in this case shows is that
3 he has been focusing on part of the case, not the whole case. He
4 said in his initial motion that he thought the liability was in
11:49AM 5 the smaller shops or the smaller volume shops, and you can see
6 that in the pleadings in this case.

7 And he talks about the second prong, Your Honor, on
8 primary duty. There is not one mention in the original motion for
9 certification filed by Mr. Solomon. That issue is not mentioned
11:49AM 10 once.

11 And Your Honor can look through that motion that was
12 filed initially in 2005. He mentions the issue, the decisive
13 issue, being whether or not you supervise two or more employees
14 and he says the class definition can only be those people who
11:50AM 15 engaged in sales duties while supervising less than two full-time
16 employees. Therefore, it's definitional.

17 And what we are saying is we accept that definition on
18 its face, and we have shown that it's far too broad because many
19 people won't qualify under that standard.

11:50AM 20 THE COURT: All right, thank you.

21 Mr. Solomon, conclude.

22 MR. SOLOMON: Thank you, Your Honor. This Court has
23 already rejected any efforts to consider the application for
24 notice as a stage 2 motion. In other words, the Court has said in
11:50AM 25 this case and in others that to consider any discovery prior to

1 the motion for notice is not appropriate.

2 It was basically raised in the summary judgment issue,
3 and we would continue to assert that it is not appropriate to
4 engage in a stage 2 certification today prior to there being any
5 discovery.

6 As to whether we've raised both prongs of the exemption,
7 in our first papers I'll point to point one on page 1 of our
8 motion, which says requiring the issuance of an expedited notice
9 to all current and former employees whose job duties, including
10 performing sales functions while supervising fewer than two
11 employees.

12 Clearly we did argue that the primary duty at issue, and
13 defendant has used that as an affirmative defense, and that's the
14 scope of the people who should receive notice.

15 The scope of people who should receive notice -- I want
16 to return to that quickly and I'll sum up -- and that is any shop
17 manager who worked at The Body Shop in the time period that
18 Ms. Rubery was a shop manager is the scope of what we're looking
19 at. Those are shop managers who are similarly situated to her.

20 The temporal proximity would continue beyond even her
21 reclassification. And as other court cases, court decisions in
22 the Second Circuit have held, is that to try and limit the scope
23 in time or as to some definition set by defendant is not
24 appropriate.

25 And that you can look at the *Anglada vs. Linens 'N*

1 *Things* decision, it's a May 29, 2007 Westlaw cite, which is 2007
2 Westlaw 1552511. And just quickly to paraphrase, basically it
3 says that stage 1 is not the time to undertake an argument against
4 inclusion of certain class members. And, additionally, it's
5 prudent to certify a broader class of the temporal scope of the
6 plaintiffs.

7 And the appropriate time for the Court to decide, well,
8 did we have too many people in our net, then we can appropriately
9 decide that, then the defendant would have -- as the plaintiffs
10 would -- discovery to decide are these people who are appropriate
11 to this class or not?

12 Therefore, we would suggest that the notice should issue
13 as per our request in the notice and that it include all shop
14 managers as well prior and after her reclassification.

15 And another cite I would just quickly like to give to
16 the Court is -- which is cited in our papers, it's the *Realite vs.*
17 *Ark* decision, and there the Court said that basically the
18 admission as to the reclass of some employees is a primary --
19 evidence of a primary finding that others may similarly have been
20 subject to violations and are entitled to notice .

21 Thank you, Your Honor.

22 THE COURT: All right, thank you both. Interesting case;
23 as always, well-argued. I don't know if either of you were
24 intending to order the transcript of the argument?

25 MR. SOLOMON: We usually do. I don't think we need it

1 immediately if the Court is busy with the trial, the criminal
2 trial, but we would request a copy of the transcript.

3 THE COURT: Well, make your arrangements with Ms. Macri;
4 it might assist the Court, but -- so I'll assume one or more of
11:54AM 5 you may order it, and I'll reserve, get you a decision as quickly
6 as I can. I know this has been pending a bit, and we'll turn to
7 it as soon as we can.

8 MR. SOLOMON: Thank you, Your Honor. I have the cases I
9 cited as well. I can hand those to you now if it will be helpful
11:54AM 10 to the Court?

11 THE COURT: Well, if they're in your papers, I don't need
12 them. If they're not --

13 MR. SOLOMON: There may have been one or two that were
14 not cited.

11:54AM 15 THE COURT: You can leave them with Ms. Rand.

16 MR. SOLOMON: Thank you, Your Honor.

17 MR. SCANLON: Thank you, Your Honor.

18 (WHEREUPON, the proceedings adjourned at 11:54 a.m.)

19 * * *

20 CERTIFICATE OF REPORTER

21 I certify that the foregoing is a correct transcript of the
22 record of proceedings in the above-entitled matter.

23

24 /s Christi A. Macri

25 Christi A. Macri, FAPR-RMR-CRR-CRI
Official Court Reporter